CLINGWRAP INVESTMENTS (PRIVATE) LIMITED
t/a UNTU MICROFINANCE
versus
PRINT AFRICA (PRIVATE) LIMITED
and
MOSES MPOFU

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 10 May 2016 and 1 June 2016

Opposed Matter

E.F Nyamundanda, for the applicant
J. Koto, for the respondent

MATANDA-MOYO J: The applicant seeks an order to amend its summons and declaration to read "interest at the rate of 7% per month from 18 June 2011 to date of payment in full".

The brief facts of the matter are that the applicant is the plaintiff in HC 10320/11 wherein it is seeking payment of a loan owed by the respondents. The second respondent is the Director of the first respondent. On or about 19 May 2011 the applicant and the first respondent entered into an agreement whereby the applicant advanced the sum of $21 500-00 to the first respondent. The loan attracted an interest of 7% for 30days.

The respondent only repaid $3 000-00 and the rest is outstanding. The applicant claimed the outstanding amount plus interest at the prescribed rate. The applicant now seeks to amend pleadings so that interest payable reflects 7% as per the agreement between the parties.

The respondents opposed the granting of the relief sought on the basis that the applicant willfully abandoned claiming an unlawful rate of interest opting for the legal prescribed rate. The respondents submitted that an amendment to reflect an unlawful rate of interest cannot be

granted by court. The respondents also submitted that the amendment introduces a new cause of action.

Ordinarily the court obliges a litigant to amend pleading when justice so requires. The court can refuse an application to amend pleadings if it's done for purposes of delaying the finality of the matter, if it's done in bad faith and if it has the effect of prejudicing the opposing party. See *Modman* v *Estte Modman and Anor* 1927 CPP 27. Such amendments are allowed at the discretion of the court. Such discretion must of course be exercised judiciously. Karey J in *Trans – Drakensberg Bank Ltd Under Judicial Management* v *Combined Engineering (Pvt) Ltd and Another* 1967 (3) SA. 632 (D) said;

> "…. the aim should be to do justice between the parties by deciding the real issues between them…… The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs, and where appropriate a postponement. It is only in this relation, it seems to me, that the applicant for the amendment is required to show it is bona fide and to explain any delay there may have been in making the application….. he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come ……. Seeking mercy for his mistake or neglect……."

In the matter *in casu* the applicant briefed new lawyers who hold different views to the applicant's views of the time of preparing the pleadings. The applicant then was alive to the fact that the agreement provided for 7% interest rate. I refer to para 5.4. of the plaintiff's declaration:

> "5.4. That the loan facility would accrue interest from the date of disbursement at the rate of 7% of the principal amount for the 30 day period of the loan".

The applicant willfully abandoned the 7% interest rate in favour of the prescribed rate; para 10 of the Declaration refers:

> "10: Plaintiff has thus abandoned the 7% rate of interest charged on the capital amount for the 30 day period as agreed in the loan agreement and claims interest on the capital amount calculated at the prescribed rate".

There is no doubt the 7% interest rate was willfully abandoned by the plaintiff. Should the same plaintiff be now allowed to claim 7% interest. Certainly not. The applicant cannot at this stage claim its lawyers acted outside his mandate when they drafted the pleadings. The lawyers were acting for the applicant and the applicant should be bound by whatever was done by its lawyer in its stead.

Amendments are allowed in order for the real issues to be canvassed by the courts. From the onset of the pleadings interest rate was never an issue as it was claimed at the prescribed rate. The plaintiff clearly indicated it was abandoning claiming interest as per agreement. This therefore is not the amendment contemplated by the rules. The applicant seeks to bring in a fresh interest rate which is higher that claimed in the summons. The prejudice to the respondent is obvious.

The applicant has not explained to the court's satisfaction why it intends to change its initial stance of abandoning the higher rate of interest. The court is of the view that having failed to obtain settlement from the respondent, the applicant is acting *mala fide* by trying to introduce 7% interest rate.

The respondent also submitted that in any case the rate of 7% per month offends against the provisions of the Moneylending and Rates of Interest Act [*Chapter 14:14]* in particular s 8(1) thereof which provides:

> "No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest"

I do not agree with the above as s 14 of the same Act provides for condition to be met by the lender when charging interest over and above the prescribed rate. The law allows the charging of interest above the prescribed rate as so provided.

At this stage without hearing evidence I am unable to make a determination that the agreement to charge interest at 7% was unlawful.

However, for reasons articulated above, I am of th view that the amendement sought will prejudice the respondent. The abandonment of 7% interest was done willfully and allowing the amendment of the pleadings would be tantamount to allowing the applicant a second bite of the cherry.

The respondent consented to the removal of the second respondent as a defendant in the main case.

In the result I order as follows:

1) The application id dismissed.
2) The second respondent be and is hereby removed from HC 835/13 as the second defendant.

3) The applicant to pay costs of suit.

Danziger And Partners, applicant's legal practitioners
Koto And Company, respondents' legal practitioners